The Supreme Court of the United States

October Term, 1904.

No. 233.

A. H. LEONARD, GEO. R. WILSON, R. N. SMITH, ET AL.

Plaintiffs in Error,

Versus

THE VICKSBURG, SHREVEPORT, AND PACIFIC RAILROAD COMPANY,

J. H. McCORMICK, Receiver,
and C. C. Harvey. President.

Brief in Reply to Motion to Dismiss or Affirm.

SYLLABUS.

"Whether a State Court has given due effect to a decree or judgment of a Court of the United States, is a question arising under the Constitution and Laws of the United States, and is within the jurisdiction of the Federal Courts."
120 U. S. 141; 107 U. S. 3;
162 U. S. 329; 169 U. S. 657;
183 U. S. 233; 21 Wal. 130.

Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection; the estoppel resulting from a judgment as against parties and privies extends to every material allegation and statement which having been made on the one side and denied on the other was at issue in the case in which said judgment was rendered and was determined therein, and where parties are identical and the titles and issues are the same as in the former suit, the final judgment in such former suit is conclusive as to the strength of those titles in a second suit where other lands are claimed by both parties under the same titles and the same issues.
168 U. S. 1; 7 Wal. 619;
157 U. S. 683; 101 U. S. 638.
124 U. S. 225; 24 How. 333;
94 U. S. 351.
Black on Judgments, p. 739.

The fact that the judgment of the Federal Court plead as res judicata in the State Court may in the opinion of the State Court, have been erroneous does not render it any the less conclusive of the issues therein decided.

"It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which ocurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every other court."
169 U. S. 432; 7 How. 612.

The fact that new evidence may be offered or new arguments suggested does not affect the question.

"Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practially an application for a re-hearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course

of proceedure is wholly inadmissible under the settled rule of res judicata."
168 U. S., p. 65.
Where in a former suit by these plaintiffs in error against this railroad company for thirty-five acres of the same tract of land, in the United States Circuit Court for the Western District of Louisiana, both parties claimed under the same titles and the same issues under which both parties now claim the remaindef of said tract of land in this suit, and there was a final verdict and judgment in favor of these plaintiffs in error in that case upon all of these titles and issues now again presented to the Court, such final verdict and judgment is res judicata and conclusive as to all of such titles and issues there decided; and since no new titles or issues are presented in this case, such judgment is conclusive of this case, and the State Court having refused to so hold and give due effect to such judgment, a Federal question of the highest order is presented for the decision of this Court.

STATEMENT OF THE CASE.

THE PETITION

The Vicksburg, Shreveport and Pacific Railroad Company instituted this suit against Albert Tibbs and many others, asserting title to lots 1, 2, 3, 4, 5, 6, 7, 8, 9 of Section 31, Township 18, Range 13, containing 178.80 acres, less a parcel of land recovered by plaintiffs in suit of **Robt. N. Smith et als. vs. Geo. A. Turner et als.**, No. 80 in United States Circuit Court, Fifth Circuit and Western District of Louisiana, and more particularly described as follows (then follows a description of the land, 35 acres, recovered in that suit.)

Petitioner further represents that the said company acquired title to said property through the grant of the United States in Act approved June 3rd, 1856, entitled an Act making a grant to the State of Louisiana to aid in the construction of railroads in siad state, duly accepted by the grantee and the trustee, and that the said land was included in the approved selections made under authority of said Act, and that its title was further acquired through divers conveyances, mortgages, decrees and sales, and by the construction of the railroad through the Parish of Caddo from the west bank of Red river to the Texas State line west of Greenwood before the 3rd day of June, 1866. T. 1.

ANSWER AND PLEA OF RES JUDICATA.

The possessors disclaimed all title and averred that they are lessees of A. H. Leonard, George R. Wilson and the heirs of W. W. Smith.

The heirs of Smith and Wilson and Leonard appeared and answered.

They admit that they are in possession of the property claimed by plaintiff, and further admit that they recovered in suit No. 80 in the United Sttes Circuit Court for the Western District of Louisiana, entitled **Robert N. Smith et als. vs. George A. Turner et als.**, the 35 acres excepted from plaintiff's petition. They aver that they are the legal heirs of W. W. Smith except George R. Wilson and A. H. Leonard, who acquired an interest from the Smith heirs.

They allege that the State of Louisiana sold to the said W. W. Smith, on the 14th d ay of May, 1853, the tract of land claimed by plaintiff at the price of one dollar and twenty-five cents per acre, which was paid to the treasury of the State and never returned to him.

That after said sale the State, through the proper authorities, on the 24th day of July, 1855, issued to Smith a patent to said tract of land, as appears by the patent annexed to the answer.

That the State of Louisiana claimed and acquired said tract of land as swamp land and overflowed land granted to the State of Louisiana by Acts of Congress of 1849 and 1850, and that the State sold it to Smith as swamp land.

They further allege that all sales of land in Louisiana made as swamp and overflowed land, whether made by the United States Government or by the State, and whether the land sold was of that character or not, were confirmed by the Acts of Congress approved March 2, 1855, entitled "An Act for the relief of purchasers and locators of swamp and overflowed lands." That said act of Congress was extended so as to protect sales made after its passage by the Act of Congress of March 3, 1857, to confirm all selections of swamp and over-

flowed lands.

That said Act of March 2, 1855, confirmed said title to said Smith, whether swamp land or not, and whether it belonged to the State or to the United States.

That said Smith thus acquired a title to said land from both the State and the United States, by purchase from the State and confirmation from Congress, and that said titles are paramount to all subsequent claims from the Government.

They finally allege that in the case of **R. N. Smith et als. vs. George A. Turner, the** Vicksburg, Shreveport and Pacific Railroad Company substituted, No. 80 on the docket of the United States Circuit Court for the Western District of Louisiana, sitting at Shreveport, in which these defendants and their authors were plaintiffs, and the present plaintiff, the Vicksburg, Shreveport and Pacific Railroad Company, was defendant, these defendants, then plaintiffs, claimed a part of the same tract of land now in dispute upon the same title upon which they now rely; and the said Railroad Company, then defendant, now plaintiff herein, also set up title to the same and relied on the same grant and title from the United States that it now sets up and relies upon in this suit.

That in said suit No. 80 a verdict and final judgment were rendered in favor of these defendants and against said Railroad Company sustaining the titles set up by these defendants as superior to that set up by the said Railroad Company; and these defendants plead said verdict and judgment as res judicata and estoppel of all the questions put at issue and decided in that case, and especially of the right of the said railroad Company to claim any other lands under the same title

against the same title held by these defendants, the respective strength of which titles was then put at issue and then finally decided.

The record in said suit No. 80 was annexed and made a part of the plea and answer. They prayed that plaintiff's demand be rejected and that the plea of res judicata be sustained and plaintiff's demand dismissed. T. 8, 10.

PLEA OF RES JUDICATA BY PLAINTIFF.

The plaintiff, the Railroad Company, filed a plea of res judicata to defendant's answer and claim of ownership of said lands.

It alleged that in a suit entitled **State of Louisiana vs. W. W. Smith,** 5135 on the docket of the District Court of Caddo Parish, filed....., 1857, defendant put at issue the validity and legality of his title to the land described in plaintiff's petition herein, and by virtue of the certificate and patent described in said petition and upon final hearing judgment was rendered in said suit decreeing said certificate and patent null and void, and decreeing the cancellation of same and ordering same to be delivered to the State of Louisiana, plaintiff therein, "All of which will fully appear by reference to certified copy of pleadings, evidence and judgment in said suit, hereto annexed and made part hereof."

That the defendant obtained an appeal which was dismissed by the Supreme Court in 1869, and that the defendants, claiming to be the heirs and assigns of W. W. Smith, are bound by said judgment in said suit which is as to them res judicata and perpetual bar to their rights of action, and therefore plaintiff prays that this exception be sustained and defendant's de-

mand be rejected. T. 14.

The case was tried and from an adverse judgment the defendants appealed to the Supreme Court of the State, where the judgment of the lower court was affirmed.

From the judgment of the State Supreme Court they took this writ of error to this Court, after an unavailing application for a rehearing, and assign, among other errors, the following:

ASSIGNMENT OF ERRORS.

"First. The Court erred, as they believe, in overruling "the pleas of res judicata and estoppel interposed by plain- "tiffs in error as defendants in this cause, based upon the "judgment of the Circuit Court of the United States for the "Fifth Circuit, Western District of Louisiana, in the case of "**R. N. Smith et als. vs. Geo. A. Turner** and the Vicksburg, "Shreveport and Pacific Railroad Co., No. 80 on the docket "of said Court.

"Second. The Court erred in refusing to hold that issues "set up and decided in said suit in said Federal Court were "res judicata of the same issues when set up in this suit "between the same parties, and in holding that where the "same parties had in a former suit set up the same titles "set up by each in this suit, and there was final judgment "upon the same, that these issues and these titles could be "again set up and litigated between the same parties, when "other lands acquired under the same titles are in contro- "versy.

"Third. The Court erred in holding that where a part "of a tract of land was in a former suit claimed by one "party under a title, and the defendant in that suit claimed "the land under another title, and there was final verdict "and judgment between the parties as to which had the "better title, and in a subsequent suit involving another "piece of land, a part of the same tract, between the same "parties, each set up a claim of ownership by the same title

"under which he had claimed the former piece of land, "that in such case the judgment so rendered passing on the "strength of the two titles in the former suit is not res "judicata as to their strength in the subsequent suit.

"Fourth. The Court erred in refusing to hold that the "matters once determined in a court of competent juris- "diction may never again be called in question by parties "or privies against objection and in refusing to hold that "the estoppel resulting from a judgment as against parties "and privies extends to every material allegation and "statement which having been made on the one side and "denied on the other, was at issue in the case in which said "judgment was rendered and was determined therein, and "in refusing to hold that where parties are identical and "the titles involved are the same, a judgment in the one "case is conclusive as to the strength of those titles in "another case, where other lands are claimed by both par- "ties under the same titles and the same issues." T. 320.

These assignments of error reiterate the complaint that the State Supreme Court failed to give due effect to the judgment of a Federal Court plead as res judicata in this case.

That this is a Federal question is well settled.

A FEDERAL QUESTION.

In **Crescent City Live Stock Compny vs. Butchers' Union, etc.**, 120 U. S., p. 141, the syllabus reads:

"Whether a State Court has given due effect to a decree "or judgment of a court of the United States, is a question arising under the Constitution and Laws of the United "States, and is within the jurisdiction of the Federal "Courts."

See also 107 U. S. 3;
21 Wal. 130;
169 U. S. 657;
162 U. S. 329;
183 U. S. 233.

That the Federal question thus presented in the plea of res judicata presented a complete defense to plaintiff's (defendants in error) action and a decision on it was necessary to a decision of the case, will be made manifest by the following brief statement of the case and of the pleadings, and of the suits which preceded the present suit:

THE FIRST ENTRY.

On April 30, 1853, the Legislature of Louisiana passed an Act anthorizing the sale of shallow lakes after they should be surveyed and had become the property of the State. T. 269. It was promulgated June 23, 1853. W. W. Smith, the author of defendant's (plaintiffs in error), purchased the land in question known as Silver Lake, from the State, on May 14, 1853. T. 257.

On June 6, 1853, the entry was marked cancelled, but his money was not reteurned or tendered him. T. 275.

On February 24, 1855, the State isued a patent to Smith in accordance with his purchase, his money not having been returned or tendered to him. T. 257.

STATEMENT OF SUIT NO. 5135.

On December 3, 1857, the State brought suit No. 5135 in the State District Court to annul Smith's patent, on the ground that the purchase was made before the law was promulgated, and before the land was surveyed, and that the patent issued in error, and then tendered him the price, the money being furnished to the District Attorney by a private citizen. T. 259, 266.

The suit was dismissed on exception, appealed to the Supreme Court, reversed and remanded.

W. W. Smith having died, his administration was made defendant on February 14, 1859.

On November 12, 1860, the case was tried and there was verdict and judgment in favor of the state annulling said patent. T. 277, 278. From this judgment the defendant appealed to the Supreme Court, where the case remained until 1869, when the minutes show that it was dismissed by consent of counsel after John W. Smith, the administrator of W. W. Smith, had been finally discharged, and there was no one in Court representing the succession of Smith or the Smith heirs. T. 279, 67, 287.

STATEMENT OF SUIT NO. 80.

On November 6, 1885, the heirs of W. W. Smith, the present defendants (plaintiffs in error), instituted suit in the Circuit Court of the United States for the Western District of Louisiana against George A. Turner, who was in possession of about thirty-five acres of the land, the suit being entitled **R. N. Smith et als. vs. George A. Turner,** No. 80 on the docket of said Court. T. 208.

They alleged that they were the heirs of W. W. Smith and as such succeeded to all of his rights, allege the sale of the land by the State to Smith, the issuance to him of the patent, that it was swamp and overflowed land granted to the State by Acts of Congress of 1849 and 1850, and that it was sold to Smith as such; that all sales of land in Louisiana claimed as swamp and overflowed lands by the State, whether of that

character or not, were confirmed by the Acts of Congress, approved March 2, 1855; that said Act was extended to sales made after its passage and continued in force by the Act of Congress of Mrch 3, 1857, to confirm all selections of swamp and overflowed lands by the several States under the Acts of Congress of 1849 and 1850; that said Act of March 2, 1855, confirmed the title of said Smith to said tract of land, and that he thus got title from both the State and the United States. T. 208.

Turner answered, declaring that he held as tenant of the Vicksburg, Shreveport and Pacific Railroad Company. T. 211.

The Railroad Company, claiming to hold under grant by Act of Congress of June 3, 1856, to the State in aid of railways and under an Act of the Legislature of 1857 passing said grant to the Railroad, filed on July 21, 1886, a plea of res judicata, alleging "That in a suit entitled "**The State of Louisiana vs. W. W. Smith,** No..... on the docket of the District Court of Caddo Parish, Louisiana, filed....., 1857, defendant put at issue the validity and legality of his title to the land described in plaintiff's petition, under and by virtue of the patent described in said petition, and upon a final hearing judgment was rendered in said suit decreeing said certificate and patent null and void, decreeing the cancellation of same and ordering them to be delivered to the State of Louisiana, plaintiff therein; all of which will fully appear by reference to a certified copy of pleadings, evidence and judgment in said suit hereto annexed and made part hereof." T. 218.

On July 29, 1886, the Railroad Company filed its answer.

It began by general denial. It then "Alleges that the sale or entry of said land, as set forth in petition, was cancelled by

the register of the State Land Office on the 10th (6) day of June, 1853, as appears by the records of that office, and which cancellation was duly notified to said W. W. Smith, and that said sale, entry and patent are null, and were done without authority of law, in this, towit:

"First. Because the law under which said entries were made had not been promulgated at the date of the entry.

"Second. Because said land had not at the time of said entry been legally surveyed, nor had any survey thereof been recognized by the State of Louisiana.

"Third. Because the patent to said land was issued by the register in error of the fact that said entry had been cancelled before the law authorizing the sale of shallow lakes had been promulgated.

"Further answering, defendant alleges that said land was never selected by the State of Louisiana as swamp and overflowed land, and has never been reported to the Commissioner of the General Land Office and neveer approved as such by the Secretary of the Interior or Land Commissioner; and further alleges that said land was never listed or returned by the Secretary of the Interior to the State of Louisiana as swamp and overflowed lands, and that the State of Louisina has never claimed or acquired said land as such; and furthermore, that said land had not and never did belong to that class of lands, but to that other class of lands known or designated as shallow lakes, and therefore not embraced in the grant from the United States Government, under the Acts of Congress of 1849 and 1850, of swamp and overflowed lands.

"Defendant further answering alleges that said defendant company is the owner of said land by good and sufficient

title, by grant from the United States Government under Act of Congress approved June 3, 1856, to the State of Louisiana, to aid in the construction of railroads in said State of Louisiana, and which was accepted by said State of Louisiana for such purpose, and all the requirements of said grant having been complied with by said State and by the Vicksburg, Shreveport and Pacific Railroad, the land described in plaintiff's petition being embraced in the said grant, was acquired by said Railroad Company and duly certified or patented as belonging to said company by the United States Government, and which has been legally sold and transferred by said Railroad Company to defendant company and deed duly recorded." T. 291.

Upon these pleadings and issues the case No. 80 went to trial, and there was a verdict for the plaintiffs, the Smith heirs, for the land sued for, being about thirty-five acres of the Silver Lake land. T. 293.

There was judgment for plaintiffs in accordance with the verdict as follows:

> "U. S. Circuit Court, Fifth Circuit, Western District "of Louisiana. Robert N. Smith et al. vs. George A. "Turner and the Vicksburg, Shreveport and Pacific Rail- "road Company No. 80.
>
> "In this case, by reason of the law and the evidence and "the verdict of the jury being in favor of the plaintiffs 'and against the defendants, it is ordered, adjudged and "decreed that the plaintiffs, **Robert N. Smith, Elizabeth A. "Smith, wife of Marvin Duval; Elizabeth W. Smith, Wil- "liam L. Smith and John S. Smith,** .he and they are "hereby declared to be owners of the land in contro- "versy and entitled to possession of the same, said land "being known and designated as follows (then follows

"description) containing thirty-five and 18-100 acres, "situated in the parish of Caddo, Louisiana," etc.

"It is further ordered and decreed that plea of res "judicata be overruled." T. 294.

A writ of error was taken to the Supreme Court of the United States but was dismissed for want of jurisdiction, the thirty-five acres involved in that suit being worth less than two thousand dollars. 135 U. S. 195.

ARGUMENT.

We have thus quoted the pleadings in that case No. 84 at great length, for the reason that it is the verdict and judgment in that case that we urged and plead in the state courts in the case at bar, and urge in this Court, as res judicata and estoppel of every issue of law and fact herein involved; every question of law and fact here in contest having been there litigated and decided, the only difference between the two cases being that it is for a different piece of land but claimed by both sides under the same title. The Railroad Company relied upon the same title in that case as in this and urged the same plea of res judicata based upon the judgment of the State Court in the case of the **State of Louisiana vs. W. W. Smith**, No. 5135, that it urges in this case; and the Smith heirs urge precisely the same titles urged in that case.

In that case all of these issues were decided in favor of the Smith heirs and against the Railroad Company, and we plead that verdict and judgment as res judicata and estoppel of all the issues raised in the present suit, and the failure of

the State Court to give due effect to the said judgment of the United States Circuit Court rendered in said suit No. 80, when plead as res judicata in this suit, presents a Federal question for the decision of this C ourt. See the authorities cited at page..4....of this brief.

Neither is the question in any sense frivolous.

The State district judge overruled the plea for two reasons, First, because the suit No. 80 involved a tract of thirty-five acres, while the present suit involves the remainder of the tract, about 142 acres; and Second, because the judgment in suit No. 80 overruling the plea of res judicata presented in that case and again in this, based upon the judgment of the State Court in **State vs. Smith**, was, in his opinion, rendered upon a false or mistaken certificate of the clerk of the Supreme Court of the State, that the appeal in **State vs. Smith** had not been filed in the Supreme Court, causing the record to show that the case of **State vs. Smith** had not been disposed of. T. 15.

We do not understand that this Court is concerned with the reasons assigned by the inferior court, but only with those assigned by the Supreme Court; but as counsel have seen proper to quote at length from the opinion of the district judge, we will examine it.

The judge says:

> "Through an error on the part of the clerk of the Su-
> "preme Court, he signed a certificate, on July 26, 1886,
> "stating that the case of the **State** vs. **W. W. Smith** had
> "not been filed in the Supreme Court. This certificate
> "was filed in the case of **Robert N. Smith** vs. **George A.**

"**Turner**, causing the record in that case not only to show "that the administrator of the succession of W. W. Smith "had filed his final account, and had been ordered dis- "charged, but that the case of the **State vs. W. W. Smith** "had not been finally disposed of.

"It is the opinion of the court that it is owing to the "fact that the certificate above referred to indicated that "no final decision had been rendered in the case of the "**State vs. Smith** that caused the judge to hold in the case "of **Smith vs. Turner** that the entry of W. W. Smith had "not been cancelled." T. 15

This certificate, T. 288, would show just the reverse. If the transcript of appeal from the judgment rendered in 1860 had not been filed in the Supreme Court in July, 1886, the appeal would be abandoned in law. Indeed, if an appeal is not filed in three days after the return day fixed in the order it is lost unless an extension of time is granted.

But it is probable that the judge intended to refer to the extract from the minutes of the Supreme Court signed by Dupree, clerk Supreme Court, T. 287, which shows that the case was on the Supreme Court docket at Natchitoches and was continued on August 14, 1866. T. 287.

There is no error in this. He does not certify that this was all the orders that had been rendered in the case; indeed, it is not certified at all, but is a mere extract from the minutes of the Supreme Court signed by the clerk.

There was no error in Clerk Wilson's certificate that the appeal had not been filed at Monroe, for it appears to have been filed at Natchitoches.

If there was error at all, it was in the Railroad Company's failing to examine the minutes of the Supreme Court after

August 14, 1866, and find out and show what had been done with the case on August 11, 1869. Surely this was no fault of the Smith heirs or of the clerk of the Supreme Court.

But even if the judgment in suit No. 80 had been erroneous, or had been rendered on a false certificate, or on false testimony (not procured by the adverse party), these things would not make it any the less res judicata. The State Court had enough to do to decide the case before it without inquiring as to the correctness of the judgment plead as res judicata.

In the very next sentence of the opinion, after making this collateral attack upon the final judgment in suit No. 80, the court recognizes that a final judgment is not subject to collateral attack by saying of the judgment in **State vs. Smith**, that,

> "In the case of the **State of Louisiana vs. W. W. Smith**, "the judgment annulling the title to W. W. Smith to "'Silver Lake' and 'Cross Lake' having become final, it "was not subject to be collaterally attacked."

It did not treat the final judgment of the Federal Court with the same consideration.

In **Central National Bank vs. Stevens**, 169 U. S. 432, at page 459, the court quotes with approval from **Peck vs. Jenness**, 7 How. 612 as follows:

> "It is a doctrine of law too long established to require "a citation of authorities, that, where a court has juris- "diction, it has a right to decide every question which 'occurs in the cause, and whether its decision be correct or "otherwise its judgment till reversed is regarded as bind- "ing in every other court; and that where the jurisdiction "of a court, and the right of a plaintiff to prosecute his "suit in it have once attached, that right cannot be ar- "rested or taken away by proceedings in another court."

In almost every case the parties could prove other facts if not prevented by res judicata, and if that would justify a court in rejecting the plea, it would be of little value.

The rule is just the reverse. He has his day in court in which he must produce all of his testimony. Subsequently discovered testimony cumulative in support of the titles urged in the former suit will not reopen the question. This alleged dismissal was in August, 1869, nearly twenty years prior to the trial of suit No. 80, and the lower court was clearly in error in holding that subsequently discovered testimony avoided the effect given to the solemn and final judgment of the Court. 168 U. S. 1.

The question is not whether the judgment was correct on the evidence produced or on such as might have been produced, but the question is: was it a final judgment?

After hearing on the same issues between the same parties, res judicata makes white black and black white.

Once established, it is like any other title which it is the duty of the Court to respect and enforce.

As already stated, the district judge and also the State Supreme Court assigned as another reason why they would not give due effect to the judgment of the Federal Court in said suit No. 80,—that said suit involved only the thirty five acres claimed in that suit and that in determining the question of jurisdiction on appeal the Supreme Court of the United States held that the thing of value before it, the res, was only the thirty five acres, claimed, and dismissed the appeal.

135 U. S. 195.

This ruling of the Supreme Court was a correct conclusion as to what was before it. Only thirty five acres were claimed in that suit and that judgment finally decided the title to only

the thirty five acres and could have been executed upon only the thirty five acres and it was not and is not res judicata as to the ownership of the remainder of the land.

But it is res judicata as to all of the issues titles and grounds of recovery and defense set up and litigated and decided between these parties in that suit, whenever the same may arise in other suits about other property between the same parties or their proxies.

The rule of law is that where the property in dispute is the same, not only every question of law and fact material to the case that was controverted and decided, but even those questions that might have been decided are concluded by the former judgment.

But where the property claimed is different from that claimed in the former suit, then the "judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

157 U. S. 683;
101 U. S. 638;
124 U. S. 225;
24 How. 333;
7 Wal. 619;
94 U. S. 351.
Black on Judgments, p. 739.

What we contend for is that the status and strength of the same titles now relied upon by both parties in this case were tested and settled in that suit and that that judgment is conclusive as to the strength of these titles when set up against

each other in any other case between the same parties in the same capacity.

Had either party raised other issues than those raised in the former suit, as, for instance, title by prescription or by tax sale, or by purchase from a stranger, or from his antagonista's author, the former judgment would not be res judicata as to any of such issues, because they were not raised or decided in such former judgment.

But it so happens in this case that no issues are in fact raised that were not raised and decided in the former case. The judgment, therefore, in that case being res judicata of all these issues, they are not open to controversy in this case.

The same thing happened in the case of thhe **Southern Pacific Railroad Company vs. United States**, 168 U. S. 1 (already cited). In that case both claimed certain lands. In a former suit or suits, the same parties had claimed other lands under the same respective titles. No issues were raised that were not raised and decided in the former suits. The judgments in the former suits were plead as res judicata as to these issues and the plea was sustained.

So in the case at bar; the titles and issues are precisely the same as in the former case.

The Railroad Company sets up the same title; the Smith heirs set up the same. The Railroad Company sets up the same plea of res judicata, based upon the same judgment of the State Court in the case of **State vs. Smith**, that it set up in the former case.

Upon all these issues there was verdict and judgment for the Smith heirs, and we submit that such verdict and judgment are res judicata of these issues in this suit; and there being no other

issues in this suit said judgment is res judicata of this case, and if due effect had been given to the judgment of the Federal Court in said suit, No. 80, by the State Court it would have so held.

Some effort has been made to construe the judgment of the Supreme Court of the United States in dismissing said suit, No. 80, for want of jurisdiction as in some way limiting the effect of the judgment in that case. If we were claiming that that judgment finally awarded the whole of Silver Lake to us, there would be something in the contention, but we are not claiming that; but claiming simply that the questions, titles and issues raised litigated and decided in that case by these parties cannot be again litigated between them, and there is not one word or hint in the opinion of this Court that militates against the finality of that judgment as to the issues therein determined. See the opinion in 135 U. S. 195.

Counsel for the defendant in error contend that the Supreme Court of the State decided the case upon the effect to be given to the judgment of the State Court in the case of **The State vs. Smith** and upon the effect to be given to the Act of the Legislature of May 14, 1853, relative to the sale of shallow lakes, and that therefore no Federal question was involved. But before reaching these questions the Court had to decide and did decide upon the effect to be given to the judgment of the Federal Court in the suit of **Smith Heirs vs. Geo. A. Turner**, No. 80, already so often mentioned, and denied to the plaintiffs in error the rights and immunities claimed by them under the same. Had due effect been given to said final judgment, the Court would have found that every issue before it in the present case had been finally decided between the

same parties in the former suit in favor of the Smith Heirs, and had become as to them the thing adjudged and conclusively true, whether true as to the rest of the world or not.

We submit that it is clear that a Federal question going to the very heart of the case is presented for the decision of this Court.

Respectfully submitted,

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